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## NOTE AND COMMENT

EFFECT OF TAKING POSSESSION OF MORTGAGED PROPERTY UNDER A CHATTEL MORTGAGE AS AGAINST A JUNIOR MORTGAGEE.—In the case of *Garrison et al.* v. *Street & Harper Furniture & Carpet Co.*, 97 Pac. 978, decided June 29, 1908, the Supreme Court of Oklahoma announces a decision upon a phase of the law of chattel mortgages which is of considerable interest. The facts were as follows: On Nov. 20, 1904, to secure an indebtedness, W. executed and delivered to G. a chattel mortgage upon certain personal property and "all furniture, fixtures * * * hereafter bought by the party of the first part (W.);" this mortgage was recorded December 31; and in the forenoon of Jan. 3, 1905, there having been a breach of condition of the mortgage, with consent of W., G. took possession of all the property. On Dec. 15, 1904, the S. & H. Co. sold to W. certain property of the nature included in the after acquired property clause of the above mentioned mortgage, without knowledge, however, of the mortgage to G., and took as security for the purchase price of such goods a chattel mortgage on the goods sold; this mortgage was filed in the proper office during the afternoon of Jan. 3, 1905. On January 15, 1905, default having been made in the payment of the debt secured by the mortgage to S. & H. Co., the company commenced an action of replevin

against G. to recover possession of the goods sold W. December 15. The court held that the defendant was entitled to retain possession.

The statutory provisions of Oklahoma necessary to an understanding of the case are as follows: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." Sec. 3445, WILSON'S REV. & ANN. STATS. OKLA. 1903.

"A mortgage of personal property is void as against creditors of the mortgagor, subsequent purchasers, and encumbrancers of the property in good faith, for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated, etc." Sec. 3578, WILSON'S REV. & ANN. STATS. OKLA. 1903.

Two grounds were urged in support of the action; first, that the first mortgagee had acquired no lien upon such after acquired property as against the vendor, the second mortgagee, because the mortgagor had acquired no "interest" therein, except such as was subject to the second mortgagee's rights, and, second, that the second mortgagee had acquired its lien in good faith, without notice of the prior mortgage, for a valuable consideration, and that failure to file the first mortgage as required by statute made it absolutely void as to all "creditors, subsequent purchasers, and encumbrancers of the property in good faith."

The court disposed of the first ground very shortly by holding that before the mortgagor could give a mortgage upon the property she must have title thereto, therefore she must have had an "interest" therein and it was subject to the first mortgage. On this point compare *Hammel* v. *Bank,* 129 Mich. 176, 88 N. W. 397, and *U. S.* v. *New Orleans & O. R. Co.,* 12 Wall. 362, 20 L. Ed. 434, holding contra. In disposing of the second ground the court bases its conclusion largely upon a recent decision of the same court, *Frick Co.* v. *Oates,* 94 Pac. 682, in which the court had overruled the earlier case of *Greenville Nat. Bank* v. *Evans,* 9 Okl. 353, 60 Pac. 249, and held that under the Oklahoma statute above quoted, § 3578, possession of the mortgaged property taken after breach of condition, with consent of the mortgagor, rendered the mortgage good as against attachment and execution liens thereafter acquired, even though the mortgage had never been filed as required by law.

Under the law of practically all of our states in order to make a chattel mortgage good as against possible rights of creditors, subsequent purchasers and encumbrancers in good faith, etc., it is necessary that either possession of the mortgaged chattels be transferred, or forthwith, or within a certain time, or a reasonable time the instrument be filed or recorded, in other words, possession and filing, to that extent, are interchangeable and accomplish the same purpose. It is also generally held that a mortgage is good as between the parties though possession is never transferred and there is no recording or filing of the instrument, and that possession taken any time after the crea-

tion of the mortgage lien is sufficient to cut off and bar the rights of parties which may *thereafter* attach to the property. But it is uniformly held under the common type of filing statute, and since the decision of the Oklahoma court in *Frick Co.* v. *Oates,* supra, that state must be included in that class, that a second mortgage taken without notice, actual or constructive of a prior mortgage creates rights superior to such prior mortgage even though the second, or junior, mortgage is never recorded, or filed. In *De Courcey* v. *Collins,* 21 N. J. Eq. 357, there was a contest of this nature, though no question of possession was involved, and the court held the second mortgage to be the prior lien. BEASLEY, C.J., speaking for the court, said that "a first chattel mortgage unregistered is absolutely void against a second mortgage taken in good faith; and such second mortgage need not be recorded at all to give it priority over such first mortgage." To the same effect see also *Bank of Farmington* v. *Ellis,* 30 Minn. 270, 15 N. W. 243, and JONES, CHATTEL MORTGAGES, (5th. Ed.), § 246 and cases cited. The court in the principal case distinguished these cases on the ground that the question of possession had not entered into them. But the mortgages, the liens of which were postponed, were recorded subsequent to the time of the creation of the junior mortgage liens; if recording and possession are interchangeable and accomplish the same results, it would seem that those cases were not properly disposed of on the ground indicated by the court in the principal case. *Weatherbee* v. *Taft,* 51 App. Div. 87, 64 N. Y. Supp. 347, is a case even closer, if possible, in point. In that case a chattel mortgage was given on a canal boat, but never properly filed as required by New York law; later possession was taken by the mortgagee; sometime between the time of giving the mortgage and the taking of possession, a second mortgage was given to another party, which also was never filed. The holder of the second mortgage, who claimed to have taken his mortgage in good faith, upon default in payment of the debt due him brought action against the first mortgagee for the purpose of recovering possession of the property, and it was held that he should recover. It was argued that the failure of the second mortgagee to file his mortgage prevented his recovering, but the court said that "The fact that the transfers to Bristol (the second mortgagee) and to plaintiff were not filed as chattel mortgages in the proper office does not deprive them of the protection of the statute. The priority of the subsequent mortgage is not made to depend on whether it is ever filed." On this point generally see also *Vining* v. *Millar,* 116 Mich. 144. It should be noticed that possession in the principal case was not taken within a reasonable time, as that expression is used with reference to the time within which instruments must be recorded or filed. *Wilson* v. *Milligan,* 75 Mo. 41.

The court in the principal case also places considerable reliance upon the decision of the Kansas court in *Cameron, Hull & Co.* v. *Marvin,* 26 Kan. 612, and quotes the following language used by Mr. Justice VALENTINE in that case: "* * * If the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, or takes possession of the property with the consent of

the mortgagor, his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint act of both parties, and hence must be held to be valid from that time on, as against all persons." But the court did not say, much less hold, that intervening rights were thereby cut off.

It is believed that the court ascribed to possession an effect which is entirely unwarranted and which finds no support either in reason or authority.

R. W. A.

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THE EFFECT OF THE REUNION OF THE CUMBERLAND PRESBYTERIAN CHURCH WITH THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA UPON THE PROPERTY OF THE FORMER.—Following the reunion of the Cumberland Presbyterian Church with the Presbyterian Church in the United States of America in 1906, it was not unnatural that controversies in regard to the ownership of the church property should arise between the dissenting minority opposing the union, and those in favor of the change. A case of this character recently came before the Court of Appeals of Kentucky. The case, decided Jan. 21, 1909, is *Wallace et al.* v. *Hughes et al.* — Ky. —, 115 S. W. 684. The action was brought to recover possession of the church building and the lot upon which it stood, by the plaintiffs who described themselves as elders, members, and communicants, of the local congregation of Cumberland Presbyterians. Their claim was that the property belonged to them because the majority had abandoned the ancient doctrines of the Cumberland Presbyterian Church. The defendants claimed title and right of possession to the property to be in themselves as trustees of the local Presbyterian Church, the lawful successor to the Cumberland Presbyterian Church, as a result of the reunion of 1906. It will thus be seen that the question at issue was the effect of the reunion, on the property formerly held by the Cumberland Presbyterian Church. The lower court decided that the plaintiffs were entitled to it. The Court of Appeals (one judge dissenting) reversing the decision of the lower court, held that the property had passed to the defendants.

It will be remembered that the Cumberland Presbyterian Church originated in a schism in the Presbyterian Church in the United States of America, in 1810, as a result of differences of opinion concerning certain religious doctrines. In 1903 the creed of the Presbyterian Church in the United States of America was revised in such a way as to remove the main differences existing between the two branches of the church. As a result a joint committee on fraternity and union was appointed by the General Assemblies of the two churches. A plan of union was agreed upon, was adopted by the General Assemblies, and was ratified in the prescribed manner by both churches.

The form of government of the Cumberland Presbyterian Church was of the prebyterial type, that is, it consisted of a general government, with its ecclesiastical power distributed among various tribunals, the lowest of which